

"The Guardian does not appear intimidated": On Freedom of the Press in the UK

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Gavin Phillipson Mi 28 Aug 2013

Here in Germany, a lot of people were rather shocked about last week's news of the British government cracking down on the Guardian to have them destroy their Snowden hard drives. That seemed to be a full-blown attack on the freedom of the press, perhaps even more so than the arrest of David Miranda the day before. Some commentators have even compared the case to our own Spiegel affair back in the 60s. Do you think there is reason for concern as to the state of freedom of the press in the UK?

Well, in the UK there has also been a lot of concern expressed by civil liberty activists, academics and so forth. But that was more about the Miranda case. The action against the Guardian was taken a lot less seriously. It seemed pointless in a way. The information on the hard drives that were destroyed was all still held by the Guardian in digital form elsewhere, so the whole thing did not stop the Guardian from doing anything. It was a macho gesture, apparently aimed at intimidation, almost a ridiculous thing to do.

Well, exactly. The government trying to intimidate a critical paper in such a brazen way under a thin pretense of national security – isn't that precisely what freedom of the press ought to protect journalists from?

It is fairly difficult to assess what happened, because we only have the Guardian editor's account, and he is not a lawyer. But as far as I understand it the visit and the destruction of the hard drives took place on a voluntary basis, albeit under threat of legal action. I think, to actually destroy the hard drives non-consensually would have required a court order. Are you familiar with the Spycatcher Case?

No, I am afraid not.

That was under the Thatcher government. There was an MI5 agent called Peter Wright. He wanted to publish a book called „Spycatcher“ which revealed a number of illegal activities of the Security Services. The Thatcher government used an injunction under breach of confidence to restrain him from publishing it. That was eventually discharged by the House of Lords but only after it had been published fairly widely around the world including the United States. It was said that any confidential information had now lost its secret quality and therefore there was no point in maintaining the injunction. But I think that would be the power that would have been used. And it does require a court order, and the court must act compatibly with Art. 10 of the European Convention on Human Rights, unless compelled to do otherwise by unambiguous primary legislation.

In Germany, the Federal Constitutional Court took the opportunity of the Spiegel affair in 1961 to lay the foundation of a freedom of press doctrine that holds the state responsible to protect the freedom of the press in the interest of its own liberal and democratic values. Is there an equivalent to this in British constitutional law?

The Human Rights Act gives effect in domestic law to Art. 10 of the European Convention. So, there is now the general contemporary protection for freedom of expression and of the press. There are also specific statutes providing protection in particular area, but that is the overarching principle. So, national courts aim to give at least as much protection as Strasbourg would through a fairly closed reading of the European Court's jurisprudence. There is also a common law protection for freedom of expression which is to the effect that a statute will not be read so as to allow interference with freedom of expression unless that is the only possible reading; general or ambiguous words will not suffice. So, there is as strong a protection as you can get in the UK, given that we do not have constitutional provisions with a higher force than an Act of Parliament.

So, the absence of a written constitution does make a difference in the level of protection of human rights?

This is a basic constitutional difference with Germany: In Germany, the Constitution is supreme, which includes obviously the freedom of expression and the press. But in Britain, the parliament is supreme and so at least in principle it can override any human right as long as it uses sufficiently clear language in legislation. So, there is not as strong protection for any human rights as you have in Germany and also in the United States under the Bill of Rights. But I would say that the freedom of expression is one of the more strongly protected rights in the UK, and in some respects stronger than in Germany.

Such as?

Take the [Axel Springer Case](#), decided by the Grand Chamber at Strasbourg. That case was very surprising to English readers. It was about a paper that had reported on the arrest of a well known actor for illegal possession of drugs at the Munich beer festival and had received an injunction from the courts on the basis that this report was interfering with his private life and there was not really a public interest in it. Now, in the UK there would be an outcry if that happened because it would be taken for granted that basically the press is free to report on the workings of the criminal justice system, provided they do not prejudice the right to fair trial. In that case the concern was privacy. Now, an English court would not have granted an injunction because it would have thought that was an infringement of freedom of the press.

One could think that this view of freedom of the press protect the press rather from their fellow citizens than from the government.

No – it protects against both. The government would have to justify any intrusion into the freedom of the press; firstly it would have to show that the interference was clearly mandated by statute or common law; secondly it would have to demonstrate that there was a legitimate aim in a democratic society for the interference (one of the aims listed in paragraph 2 of Article 10); thirdly it would have to pass the test of proportionality and the courts look at that quite strictly. Certainly, if the government were simply to try to suppress a story that was politically embarrassing to the government, that would not be a legitimate aim. In this case I believe that at least some of the material the Guardian is publishing may be covered by the Official Secrets Act. If that is right, there would be a legal power to prosecute the Guardian.

But the whole thing looks as if it was not actually all that much about protecting national secrets after all, but rather about intimidating and putting pressure on critical journalists, doesn't it? I do not quite see why the British should not take that seriously.

Well, it is certainly highly unusual. I had never heard of such a thing happening ever before. I think part of it is because the Guardian himself has presented the government making a fool of itself. It is a sinister thing to happen, but a kind of embarrassing thing, too. It makes the government look stupid. Many think the Guardian only consented to destroy the hard drives on a voluntary basis because it did not make any difference on the reporting. It was not stopping them reporting the story. The Guardian does not appear intimidated, does it? Perhaps that is why people were not as concerned as you would expect them to be.

Does this different perception of the Guardian case also reveal something about the different constitutional cultures in the UK and other countries?

Freedom of the press is one of the stronger protected rights partly because the press is a very dominant force in the UK, much more so than in the United States, in which the print media is losing ground more to new media. In this country, the government is still rather scared of the newspaper industry and of the power the press has. So, to some extent the press can look after its own interest in terms of press freedom. But I also think that when the government says a given rights-infringing measure is necessary for national security or for anti-terrorism purposes then this is an area where the courts in this country, but I think also in the United States, have tended to afford the executive a fair

degree of leeway.

The government is trying to reform the press regulation at the moment, isn't it?

Yes, and I think that is a great example of the staggering power of the traditional press. We had the Leveson Report, and opinion polls showed a very solid and stable majority of the public in favour of implementing the Leveson recommendations. All three political parties support that. But it is not happening, at least at the moment, because the press has been able to deter the government from acting. So, no-one knows what the outcome will be, but the press has again just demonstrated its enormous power in this country, that it has been able to face off the government, all political parties and a solid majority of public opinion.

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